IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

:: J U D G M E N T ::

D.B. CIVIL SPECIAL APPEAL NO.379/2007

Dhruva Capital Service Limited
Vs.
State of Rajasthan & Ors.

D.B. CIVIL SPECIAL APPEAL (W) NO.382/2007

M/s. Shiva Wines and Tolls Limited
Vs.
State of Rajasthan & Ors.

Date of Judgment :: 16th April, 2007.

:: P R E S E N T ::

HON'BLE THE CHIEF JUSTICE SHRI S.N.JHA
HON'BLE SHRI JUSTICE GOVIND MATHUR

Shri M.R. Singhvi for appellant in SAW no.382/2007.
Shri Vikas Balia for appellant in SAW no.379/2007.
Shri J.P. Joshi for the respondent.

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BY THE COURT (PER HON'BLE THE CHIEF JUSTICE) :

These two appeals involving a common dispute arising from the common judgment of the learned Single Judge were heard together and are disposed of by this common order.

The dispute relates to grant of contract for collection of excess royalty on excavation of marble within Rajsamand, Khumbhalgarh, Amet and Railmagara of Rajsamand district. Grant of royalty collection contract, among other things, is governed by the Rajasthan Minor Mineral Concession Rules, 1986 (in short, 'the Rules').

Facts of the case, briefly stated, are that on 20.1.2007 tender notice was issued by the Superintending Mining Engineer, Department of Mines and Geology, Udaipur Circle inviting tenders for grant of royal collection contract in the aforesaid area for a period of three years from 1.4.2007 to 31.3.2009. In the tender notice, the reserve price was mentioned as Rs.63.70 crores. As per the notice, the tenders were to be opened on 12.2.2007 but as no tender was received, on 14.2.2007 another tender notice was issued wherein too the reserve price was mentioned as Rs.63.70 crores. Two tenders were received this time. While M/s. Chawanda Associates – respondent no.5 in Special Appeal no.379/2007 and respondent no.4 in Special Appeal no.382/2007 (hereinafter referred to as 'the respondent') – submitted bid to the

tune of Rs.58,00,21,131/-, one M/s. Rebecco Exporter offered Rs.53 crores. On 6.3.2007 another tender notice was issued – apparently because the amount offered by the said two tenderers was below the reserve price. The respondent submitted bid of Rs.58.31 crores i.e. about Rs.31 lakhs more. M/s. Rebecco Exporter offered Rs.51 crores which was less than what had been offered earlier. The tenders were opened on 23.3.2007. The tender committee provisionally accepted the bid of the respondent and it was asked to deposit 12.5% of the bid amount within three days. Accordingly the respondent deposited Rs.7.29 crores on 26.3.2007. On 28.3.2007 the Director, Mines passed order awarding contract in its favour.

At this stage Dhruva Capital Service Limited – appellant in Special Appeal no.379/2007 – came on the scene and offered sum of Rs.59,31,21,000/- by a telegram which it claims to have sent on 27.3.2007 (According to the Department, the telegram was received on 28.3.2007). On 28.3.2007, the other appellant, namely, M/s. Shiva Wines and Tolls Limited also entered the fray offering amount of Rs.59.32

crores. They also filed writ petitions in this Court.

The case of the appellants is that on 29.3.2007, after hearing the parties including the respondent which had suo motu entered appearance under caveat, a learned Single Judge of this Court took notice of the offer of appellant M/s. Shiva Wines and Tolls Limited for Rs.60.56 crores and adjourned the case to enable the counsel for the respondent to seek instructions in the light of revised offer. The learned Jude also passed an interim order to the effect that till the next hearing on 2.4.2007 the tender finalized in favour of the respondent shall not be executed. It was submitted that in the light of the said order, the respondent was required to make counter offer if it so liked to outbid the appellant but in stead of taking that course the writ petitions were finally heard and dismissed vide impugned order on 9.3.2007.

The case of the appellants is that the award of contract in favour of the respondent at less than the reserve price was arbitrary and illegal as the tender notice did not contain any such clause regarding reduction of the reserve

price; and secondly, if the authority intended to award contract below the reserve price, it should have intimated the public at large of its intention so that the intending bidders who did not submit tender considering the high reserve price, could submit tenders and participate in the tender process. According to the appellants, they did not submit tender as they had no idea that contract could be awarded at a lesser price. Grant of contract at a price less than the reserve price without giving opportunity to the intending bidders at large to participate in the tender process not only amounted to denial of opportunity but also resulted in grant of public largess without due notice and public participation in the tender process, and is therefore violative of Article 14 of the Constitution of India.

The respondent has questioned the locus standi of the appellants to challenge the award of contract on the ground that they did not submit tenders of their own pursuant to the tender notices. On merit of the case it was submitted that clause (f) of rule 35 of the Rules confers power on the Director to accept tender below the

reserve price. Dwelling upon the circumstances in which the tender was accepted, it was submitted that the third tender notice was opened on 23.3.2007, the date fixed in the tender notice as per rule 35(a) in terms of which tender can be opened or accepted only after expiry of 15 days from the date of issue of tender notice. Earlier, the tender notices had either failed to elicit response or the bids submitted were less than the reserve price. As on 23.3.2007 the authorities had no time for issuing another tender notice because in view of rule 35(a) it is mandatory to give 15 days' notice and the existing contract was going to expire on 31.3.2007. The said contract being only for Rs.45 crores it was apparently not advisable for the State to continue the contract after expiry of the stipulated period. In the circumstances, the Tender Committee on 23.3.2007 accepted the bid offered by the respondent which was more than the amount offered by the other bidder, Rebecco Exporter. Pursuant to the decision of the Tender Committee, the respondent deposited Rs.7.29 crores being 12.5% of the bid amount on 26.3.2007. On 28.3.2007 final order was issued awarding contract to it. After writ petitions were

dismissed on 9.4.2007 the contract was finally awarded on the respondent depositing total of Rs.19.43 crores including the bank guarantee for Rs.7.29 crores. The respondent has started operating the contract and at this stage in the facts and circumstances no interference is called for by this Court much less at the instance of the appellants who did not respond to the tender notices and file tender after complying with the requirements prescribed in the Rules.

Three points arise for consideration in these appeals – (i) whether the award of contract at a price less than reserve price is in accordance with law; (ii) whether non-disclosure of the fact in the tender notice that the contract could be awarded below the reserve price - allegedly preventing the appellants from submitting tenders - vitiated the tender process; and (iii) whether the appellants are competent to challenge the grant of contract.

It is true that the tender notice did not contain any clause that the condition as to the reserve price was subject to relaxation but the notice expressly stated that tenders were being invited for grant of contract for collection of

excess royalty "subject to the terms and conditions specified in rules 32, 35 and 37 of the Rules and instructions contained in government letter no.P-19(9)Mines/Group-2/99 dated 6.6.2005". Rule 32 deals with grant of excess royalty contract, rule 35 lays down the procedure for calling tenders and rule 37 provides for execution of lease or contract after the bid/tender is accepted by the competent authority. On behalf of the respondent our attention was drawn to clause (f) of rule 35 which according to counsel for the respondent empowers the Director to accept tenders below the reserve price. Clause (f) runs as follows :-

> "No tender for mining lease or royalty collection contract of the value of Rs.10,000/- - or less, recording a fall exceeding 25% and similar tender for mining leases or royalty collection contract of the value of more than Rs.10,000/- recording a fall exceeding 10% in the amount of dead rent or contract in comparison with that of previous lease or contract in the same area or received below reserve price shall be accepted without prior approval of the Director."

Omitting the irrelevant words (irrelevant for these cases) the rule lays down that "No tender for . . . . . royalty collection contract . . . . . .received below reserve price shall be accepted

without prior approval of the Director". A bare reading makes it evident that the Director is competent to accept tender quoting price less than the reserve price. The invitation of tenders being subject to the relevant rules – as it had to be – it would follow that it was not necessary to make it part of the tender notice that the condition as to reserve price could be relaxed or that the tender below the reserve price could be accepted.

It was submitted on behalf of the appellants that tender below the reserve price can be accepted with the prior approval of the Director, and therefore the power can be exercised only by some officer other than the Director, that is, inferior to the Director. We find no substance in the submission. In the instant case, order accepting the tender and awarding contract in favour of the respondent was issued by the Director himself. If Director is competent to approve proposal of a subordinate officer to accept tender below the reserve price, he can certainly accept such tender himself.

As mentioned above, tenders were invited subject to the terms and conditions specified in rules 32, 35 and 37 of the Rules, and there being a express provision - conferring power on the Director to accept the tender below the reserve price, that is, reduce the reserve price, the award of contract in favour of the respondent at a price less than reserve price cannot be said to be illegal. In view of the said provision, it was not necessary to indicate in the tender notice that tenders quoting price less than the reserve price could also be entertained or that the condition as to the reserve price could be relaxed by the Director. The proposed grant being subject to among other things the provisions of rule 35(f), the appellants – or for that matter any other intending bidder if any – should have shown better discretion and submitted tender and participated in the tender process.

The thrust of the submission of counsel for the appellants was that if the authorities intended to accept tender below the reserve price, they should have made it known to the public at large so that the persons interested could

participate in the tender process. Grant of contract in favour of the respondent below the reserve price without giving such opportunity to the appellant or others resulted in denial of opportunity to participate in the tender process vitiating the entire process as being violative of Article 14 of the Constitution of India. Reliance was placed on Ramana Dayaram Shetty Vs. The International Airport Authority of India, AIR 1979 SC 1628. Particular reference was made to para 9 of the judgment in which while repelling the objection as to locus standi of the person who does not submit tender pursuant to the tender notice to challenge the award of contract, their Lordships observed as under :-

> " . . . . .The grievance of the appellant, it may be noted, was not that his tender was rejected as a result of improper acceptance of the tender of the 4th respondents, but that he was differentially treated and denied equality of opportunity with the 4th respondents in submitting a tender. His complaint was that if it were known that non-fulfilment of the condition of eligibility would be no bar to consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. But he was precluded from submitting a tender and entering the field of consideration by reason of the condition of eligibility, while so far as the 4th respondents were concerned, their tender was entertained

> and accepted even though they did not satisfy the condition of eligibility and this resulted in inequality of treatment which was constitutionally impermissible. This was the grievance made by the appellant in the writ petition and there can be no doubt that if this grievance were well founded, the appellant would be entitled to maintain the writ petition. The question is whether this grievance was justified in law and the acceptance of the tender of the 4th respondents was vitiated by any legal infirmity."

Facts of the case in Ramana Dayaram Shetty (Supra), briefly stated, were that a tender notice for running IInd class hotel and two snack bars at the international airport at Bombay was issued by the International Airport Authority of India. The noticed stated, among other things, that sealed tenders in the prescribed form were invited from "registered IInd Class Hoteliers having at least 5 years' experience". In terms of the tender notice thus only IInd class hoteliers having 5 years' experience were eligible to submit tender. The contract however was awarded to the 4th respondent even though he did not fulfil the said condition. An attempt was made to justify the contract on the ground that other tenders having been rejected, the contract was awarded after negotiation. Answering the question posted in para

9 of the judgment (quoted hereinabove), their Lordships held as under :-

> "**34.**It is, therefore, obvious that both having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law, the 1st respondent was not entitled to act arbitrarily in accepting the tender of the 4th respondents, but was bound to conform to the standard or norm laid down in paragraph 1 of the notice inviting tenders which required that only a person running a registered IInd Class hotel or restaurant and having at least 5 years' experience as such should be eligible to tender."

On behalf of the respondent it was submitted that the ratio of decision in Ramana Dayaram Shetty (Supra) is applicable in cases where the condition or standard of eligibility is relaxed at the time of considering the tenders, as in such a case it can be said that relaxation resulted in denial of opportunity to those who considering themselves ineligible did not apply. But where there is no such relaxation of the standard of eligibility – like in the present case – the decision has no application. Reference was made to Poddar Steel Corporation Vs. Ganesh Engineering Works, (1991) 3 SCC 273. The relevant observations occurring in para 6 of the judgment

may be quoted as under :-

> ". . . . As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories – those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in *C.J. Fernandez v. State of Karnataka* a case dealing with tenders."

The question is whether the condition relating to reserve price is a condition of eligibility or merely ancillary or subsidiary with the main object. The object underlying the condition that no tender shall be accepted below the reserve price is to secure the price which is considered to be minimum, that cannot be said to be a condition of eligibility. Rule 33-A of the Rules which deals with the reserve price lays down that the reserve price shall be evaluated keeping in view (i) actual physical quantities of mineral

produced and despatched from the area concerned; (ii) last years collection of royalty from that area; (iii) contract amount on which present contract is in force; (iv) expected increase in revenue in the proposed contract period due to increased consumption of mineral in coming times; and (v) any other relevant matter about the area. We do not think having regard to the object underlying the grant of contract at reserve price, fixing the reserve price can be said a condition of eligibility. In Ramana Dayaram Shetty (Supra), what was relaxed was the condition of eligibility – as held in para 7 of the judgment, and therefore the ratio of decision has no application in the instant case.

On behalf of the appellants reliance was next placed on Ram and Shyam Company Vs. State of Haryana, AIR 1985 SC 1147, and it was submitted that having regard to the offer made by appellant M/s Shiva Wines in this Court (as stated hereinabove) and the fact that the case was adjourned to enable the respondent to make a counter offer, this Court should call upon the respondent whether it is prepared to offer a higher amount.

The facts of Ram and Shyam case were that the appellant Company had made highest bid for grant of mining lease. The Presiding Officer conducting the auction accepted the bid but the State Government did not confirm the same, and a fresh auction was held. The appellant again made the highest bid. The State Government again declined to confirm the same. At this stage respondent no.4 addressed a letter to the Chief Minister of the State of Haryana casting aspersions on those who participated in the auction. Therein he also stated that if the contract is awarded for a period of five years, he was willing to pay higher amount. The offer was accepted by the Chief Minister and this gave rise to dispute. In the facts and circumstances of the case, having regard to the objections raised on behalf of the State as stated in para 5 of the judgment, the parties were called upon and they made bids in the manner mentioned in the judgment.

Taking cue from what happened in the case, counsel for the appellants made a request that we take the similar course and call upon the parties to make their bids so that – as put by the

counsel – the State gets the best price. In this connection reference was also made to a decision of this Court in H.U. Construction Co. Vs. State of Rajasthan, (1992) 2 RLR 46.

The cases were decided in the peculiar facts and circumstances and we are not persuaded to take similar course. As a matter of fact, we find substance in the contention of counsel for the respondent that having regard to the paucity of time as on 23.3.2007 the authorities had little option but to accept the tender of the respondent. As seen above, the first tender notice did not attract any bidder. The second tender notice did elicit response but the tenders were below the reserve price. The authorities issued tender notice for the third time. While the respondent revised its bid and offered a higher amount – Rs.58.31 crores as against Rs.58 and odd crores offered earlier, the offer of M/s. Rebecco Exporter was even less than what it offered earlier. The tenders were opened on 23.3.2007 which was the date fixed in the tender notice as per rule 35(a) of the Rules which lays down that "the notification shall be published at least 15

days before the date of tender". The period of existing contract was going to expire within eight days hence, and therefore the authorities had little option but to accept the tender. Considering the level of the response – or the lack of it – the decision to accept the tender of the respondent cannot be said to be arbitrary or illegal or lacking in bona fide.

Challenging the locus of the appellants it was submitted on behalf of the respondent that in terms of rule 35(d) a tender is required to be accompanied by (i) earnest money; (ii) affidavit regarding no outstanding dues against the tenderer or partners/directors or their family members as the case may be; (iii) power of attorney/resolution of the Board of Directors in case the tenderer is partnership firm or company or society as the case may be; and (iv) attested copy of certificate of registration with the department. In terms of clause (dd), Tender not accompanied by requisite earnest money, affidavit regarding no dues, power of attorney and copy of registration certificate as specified in clause (d) "shall be considered invalid and liable to be rejected at the time of opening the tenders". It

was submitted that as the appellants did not submit the tender there was no question of their furnishing the above-said documents which is a condition precedent for entertaining their tender, and the appellants at this stage cannot short-circuit the procedure by filing application in the department or writ petition in this Court staking claim for grant of contract at the fag end of the tender process. The submission was sought to be countered on behalf of the appellants on the ground - as already mentioned above – that the reserve price mentioned in the tender notice prevented them from filing tenders. We have already dealt with this argument above.

We are of the view that where the person is prevented from filing tender or is misled by the terms of tender notice and therefore does not file tender, he may challenge the tender process for grant of contract, but where he is not prevented or so misled, he cannot challenge the grant if he did not submit tender of his own and participate in the process. In the premises set forth above, it would follow that the appellants are not competent to challenge the grant of contract in favour of the respondent.

It was submitted that dismissal of the writ petitions was not on the ground that appellants lack in locus standi and it is not open to the respondent to urge the point in appeal. We find no substance in the submission. The question as to whether the person possesses the requisite locus standi or not is a question of law and on admitted facts the question can certainly be raised and gone into at the appellate stage.

In course of arguments counsel for the appellants also referred to M/s. Kasturi Lal Lakshmi Reddy Vs. The State of Jammu & Kashmir, AIR 1980 SC 1992; Tata Cellular Vs. Union of India, AIR 1996 SC 11; W.B. State Electricity Board Vs. Patel Engineering Co. Ltd., (2001) 2 SCC 451; and Anil Kumar Srivastava Vs. State of U.P., (2004) 8 SCC 671.

In M/s. Kasturi Lal Lakshmi Reddy(Supra), after reiterating the propositions for grant of government contracts, in the circumstances noticed in paragraphs 21 and 22 of the judgment, tapping contract with respect to resin in the State of Jammu & Kashmir granted on the basis of

negotiation without inviting applications from the intending bidders was held to be not arbitrary or irrational. In Tata Cellular (Supra) the point for consideration was the extent of judicial review of decisions accepting or refusing tenders. In para 84 of the judgment to which our attention was drawn the ingredients of tender were laid down. We fail to appreciate how these decisions are of any help to the appellants.

The decision in W.B. State Electricity Board (Supra) was cited on the point of relaxation or waiver of condition of tender. In para 24 of the judgment to which our attention was drawn it was observed that any competitive bidding postulates keen competition and high efficiency. Where bidders who fulfil pre-qualification alone are invited to the bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it may encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values. We have already dealt with the question of relaxation and held that not only there is power

to relax the condition regarding reserve price but also upheld the grant of contract below the reserve price in favour of the respondent in the prevailing circumstances.

In Anil Kumar Srivastava (Supra) the point for consideration was whether sale can be challenged on the ground that though it was more than the upset or reserve price the property did not fetch proper price, and on that ground the sale can be set aside. It was held that fixation of upset price does not preclude the claimant from proving that the land was sold at low price. The decision does not provide any assistance to the appellants.

On behalf of the respondent reliance was placed on State of Punjab Vs. Yoginder Sharma Onkar Rai & Co., (1996) 6 SCC 173; M/s. B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd, 2006 AIR SCW 5834; Air India Limited Vs. Cochin International Airport Ltd., (2000) 2 SCC 617; and Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd, (2005) 6 SCC 138.

In Yoginder Sharma (Supra) it was held that finality of the auction should be recognized as being in the interest of exchequer. If

auctions are set aside and re-auctions are ordered on less than satisfactory material, the loss to the exchequer may be far greater. It was observed that if at the fresh auction the party aggrieved does not bid and no other bidder offers bid equivalent to the earlier successful bid, and the writ petition is to be dismissed, there can be no justification for holding a fresh auction.

In B.S.N. Joshi (Supra) after summarizing the horizons of judicial review in para 68 of the judgment it was observed -

> "**71.** While saying so, however, we would like to observe that having regard to the fact that a huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which is economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a latter stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting

> tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and *bona fide*. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction."

In Air India Ltd. (Supra) it was observed that in commercial transactions price is not always the sole consideration. In Master Marine Services (Supra) it was held that the condition can be relaxed in public interest.

In view of our findings in the context of questions posed at the outset, the conclusion is irresistible that the grant of contract in favour of the respondent does not suffer from the vice of arbitrariness or illegality, and therefore the learned Single Judge did not commit any error in dismissing the writ petitions.

In the result, the appeals are dismissed.

[GOVIND MATHUR],J. **[S.N.JHA],CJ.**

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